

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

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Toll Free Service Access Codes)

CC Docket No. 95-155

COMMENTS OF THE WEATHER CHANNEL, INC.

The Weather Channel, Inc. ("The Weather Channel"), by counsel and pursuant to 47 C.F.R. § 1.415, submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

I. INTRODUCTION

The Weather Channel, a subsidiary of Landmark Communications, Inc., is an Atlanta-based national cable television network that reaches 61.5 million U.S. households. The Weather Channel provides viewers with local, regional, and national weather conditions, and other special features designed to meet its viewers' interests, 24 hours per day, 7 days per week. The Weather Channel also offers several interactive weather-related audiotext services, including 1-900-WEATHER and 1-800-WEATHER, which provide callers with updated weather information for over 600 U.S. cities and 225 international cities, as well as ski conditions for over 500 ski areas worldwide. In addition, The Weather Channel provides computer online services through interactive sites on CompuServe and the World Wide Web.

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The Commission has recognized that 800 number subscribers may have a substantial financial interest in retaining equivalent vanity numbers drawn from a new toll free code, and instituted this proceeding to ensure a proper balance between this interest and the need to manage a limited numbering resource.^{1/} The Weather Channel has invested substantial resources over the years in promoting its audiotext services nationwide. As a result, many consumers now closely associate the number 1-NXX-WEATHER with accurate, timely, comprehensive, high quality weather and related information. Furthermore, the audiotext services provided by The Weather Channel are among the highest volume consumer-oriented telephone information services offered in the United States. Therefore, The Weather Channel possesses a significant economic interest in its toll free number and has a vital stake in the outcome of this proceeding.

II. THE WEATHER CHANNEL WILL SUFFER SUBSTANTIAL HARM IF IT IS NOT PERMITTED TO RETAIN ITS EQUIVALENT VANITY NUMBER IN NEW TOLL FREE CODES.

Today, it is widely known that telephone numbers beginning with "1-800" are toll free. When the 888 service access code ("SAC") becomes available in March 1996, however, consumers soon will learn to associate both 800 and 888 numbers with toll free service. This inevitably will produce some confusion concerning the proper prefix to dial to reach a particular toll free subscriber. Consumer confusion will have at least two undesirable effects. First, it will facilitate the ability of an 800 subscriber's competitors to trade on the goodwill the subscriber has developed in its 800 vanity number. For example, if a competitor of The Weather Channel

^{1/} NPRM ¶ 35.

were to obtain the number 1-888-WEATHER, it would benefit unfairly from the reputation The Weather Channel has established for its number, and The Weather Channel could lose potential customers. Second, the reputation of The Weather Channel could suffer if callers to 1-888-WEATHER receive poor service and unwittingly assume the service is from The Weather Channel. Neither of these results should be permitted.^{2/}

III. TOLL FREE SUBSCRIBERS WITH AN ECONOMIC INTEREST IN THEIR TELEPHONE NUMBERS SHOULD HAVE THE OPTION OF PROTECTING THAT INTEREST THROUGH A RIGHT OF FIRST REFUSAL.

The most effective way to solve the problems discussed above is to provide toll free subscribers with a right of first refusal concerning the toll free analogues to their numbers.^{3/} This right should be extended to all toll free subscribers regardless of the apparent value of their numbers. To exercise the right, however, a subscriber should be required to pay a reasonable, one-time fee of \$10,000-\$20,000.^{4/} The one-time fee will serve as a self-selecting mechanism, helping to ensure that only those subscribers with a substantial and quantifiable economic interest in their toll free numbers reserve numbers from the pool of new toll free SACs.^{5/}

^{2/} Harm also will result if *non-competitors* obtain equivalent toll free numbers. An 888 subscriber, for example, will be billed for misdialed calls (those calls intended for an 800 subscriber), and the 800 subscriber could lose potential customers.

^{3/} Since the problems associated with 888 vanity numbers also will be present with respect to other future toll free SACs (*i.e.*, 877, 866, etc.), a right of first refusal should attach to all future codes as well.

^{4/} Revenues generated by means of this fee should be used to educate consumers about future toll free SACs through public service announcements. See NPRM ¶ 41.

^{5/} Since a one-time fee alone may be inadequate to deter number brokering and warehousing, The Weather Channel strongly urges the Commission to adopt effective rules to
(continued...)

Vesting 800 subscribers with a right of first refusal will properly place the burden of appraising vanity numbers on the parties best able to do so -- those who will suffer the most harm if their 888 analogues are assigned to other entities. In other words, a right of first refusal will permit incumbent subscribers to judge individually whether the exercise price for the right outweighs the potential economic losses their businesses may sustain if they allow their numbers to be otherwise assigned. Furthermore, a right of first refusal will lessen consumer confusion by reducing the likelihood that direct competitors will share toll free analogues.

The Commission has asked whether subscribers should be required to pay for the right of first refusal through a competitive bidding process.^{6/} Competitive bidding should not be used for two reasons. First, incumbent subscribers with little capital would be unfairly prejudiced under such a system since they easily could be outbid by a well financed competitor. Second, the only parties likely to bid against incumbent subscribers are direct business competitors or speculators who intend to sell the numbers to competitors. If either of these parties were to

^{5/}(...continued)

prevent these practices. In this regard, The Weather Channel supports the Commission's proposal to cap the amount of numbers a RespOrg may hold in reserve status. *Id.* ¶ 33. The Weather Channel also supports the Commission's conclusion that RespOrgs should be required to certify on a quarterly basis that "(1) there is an identified subscriber who has agreed to be billed for service associated with each toll free number requested from the database; and (2) there is an identified, billed subscriber before switching a number from reserved or assigned to working status." *Id.* ¶ 34. Finally, The Weather Channel encourages the Commission to adopt rules patterned after the industry guidelines against brokering telephone numbers. *See Industry Guidelines* § 2.2.1; NPRM ¶ 16. Stringent enforcement of anti-brokering and warehousing rules, in conjunction with the option fee requirement, should help to prevent the inefficient depletion of numbering resources.

^{6/} NPRM ¶ 41.

outbid the incumbent, the Commission's purpose for establishing a right of first refusal (to protect the incumbent's goodwill in a number) would be frustrated.^{7/}

IV. NO OTHER SOLUTION PROPOSED BY THE COMMISSION WILL ADEQUATELY PROTECT THE INTERESTS OF TOLL FREE SUBSCRIBERS.

A. Industrial Classifications

As an alternative to a right of first refusal, the Commission suggests that Standard Industrial Classification ("SIC") codes could be used to categorize toll free subscribers by the type of business in which they engage.^{8/} Under this proposal, toll free subscribers in the same line of business would be unable to obtain equivalent telephone numbers beginning with different toll free codes. The Commission states that this would "allay[] the fears of current 800 number subscribers that a competing business would obtain the equivalent number in a new toll free code"^{9/} Unfortunately, this proposal will not work.

As a cable television service, the SIC code for The Weather Channel is 4841. Audiotext (interactive telephone) competitors of The Weather Channel, however, include *USA Today* (SIC code 2711 -- newspaper) and other interactive telephone services that provide weather information (*e.g.*, telecommunications service bureaus, SIC code 4813; commercial weather bureaus, SIC code 7383; online information retrieval services, SIC code 7375; weather forecasters, SIC code 8999). Thus, if a competing service bureau requested the number 1-888-

^{7/} See *id.* ¶ 35.

^{8/} *Id.* ¶ 44.

^{9/} *Id.* ¶ 45.

WEATHER, the SIC code screening mechanism would not prevent it from obtaining that number since its SIC code is different from that of The Weather Channel.

Furthermore, implementing an SIC screening system would significantly delay the introduction of the 888 SAC. First, Database Services Management, Inc. ("DSMI"), a subsidiary of Bellcore which administers the SMS/800 database, would have to develop and install new software for the SMS that is capable of screening reservation requests in the manner outlined in the NPRM. This would not be a simple task. Second, DSMI would have to enter the SIC code for every current 800 subscriber into the SMS database before a single 888 number could be reserved. Finally, the Commission would have to develop elaborate administrative procedures to deal with the inevitable appeals from parties who believe their numbers were improperly managed. Given the amount of work required to implement an SIC screening mechanism, it is extremely unlikely that the infrastructure could be in place before the first 888 reservation is taken in March 1996.

B. Late Release Procedure

As another alternative, the Commission suggests requiring the administrator of the SMS "to release those 888 numbers identified as equivalent toll free vanity numbers at the end of the toll free assignment pool."^{19/} As an initial matter, it is unclear how numbers would be identified as vanity numbers under this proposal, and therefore held for later release. Moreover, assuming these numbers were properly identified, the proposal neglects to explain the mechanism by which competitors of a business with an 800 vanity number would be prevented from waiting

^{19/} *Id.* ¶ 46.

until the end of the pool before requesting the equivalent 888 number. For example, nothing would prevent a competitor of The Weather Channel from simply waiting until all non-vanity 888 numbers are assigned, and then reserving 1-888-WEATHER. In fact, there is every incentive for competitors to do just this. This proposal may postpone the problems discussed above in Section II, but it fails satisfactorily to resolve them, and for this reason it should be rejected.

C. Transitional Gateway

The Commission also suggests requiring carriers to provide a "transitional gateway intercept" during the change to a new toll free access code.¹¹⁷ According to this proposal, when a consumer called either 1-800-WEATHER or 1-888-WEATHER, the consumer would hear a recorded message directing him either to press "1" to be connected to The Weather Channel, or to press "2" to be connected to a competitor of The Weather Channel. This proposal fails to prevent a company's competitors from exploiting the goodwill and equity it has invested in its 800 number. Moreover, it would increase, rather than decrease, consumer confusion. Callers who routinely call 1-800-WEATHER, and who are unaware that another weather service now has the number 1-888-WEATHER, naturally will be confused by a message that requires them to dial additional numbers to reach The Weather Channel. Moreover, the cost of providing such transitional messages will be substantial, yet the proposal makes no mention of how it would be funded. Finally, as with the SIC screening proposal, deploying the software

¹¹⁷ *Id.*

required to provide transitional messages is likely to delay the implementation of 888 beyond March 1996.

D. Partitioning by Use

The Commission also suggests partitioning toll free service by use.^{12/} Specifically, business entities and the majority of vanity number holders would be required to use the 800 code while subscribers who use their numbers for personal and/or paging purposes would be relegated to the 888 code. As with the "Late Release" proposal discussed above, this proposal temporarily would eliminate the possibility of a business competitor obtaining the 888 analogue of an incumbent's 800 vanity number, but it is not a long term solution to the problem of 800 exhaust. Once business subscribers use up the supply of 800 numbers, the industry will be faced with exactly the same problems it faces now. Since this proposal fails satisfactorily to resolve these problems, it should be rejected.

E. Trademark Protection

Finally, the Commission asks whether "federal trademark law alone will sufficiently protect the current holders of 800 vanity numbers against new code assignments that may produce the same vanity acronyms."^{13/} Trademark law may protect some 800 subscribers, but it will not adequately protect all vanity number subscribers since some words and/or numbers

^{12/} *Id.*

^{13/} *Id.* ¶ 40.

are not protectible. The law does not protect The Weather Channel, for example, because the word "WEATHER" cannot be trademarked.^{14/}

The Commission also states that the courts that have ruled on the intellectual property nature of telephone numbers have limited their holdings to the question of whether the mnemonic term, rather than the underlying number, is entitled to protection.^{15/} Research reveals, however, that two U.S. Courts of Appeals have addressed this issue and have issued conflicting rulings.^{16/} Since the U.S. Supreme Court has not yet resolved this conflict, 800 subscribers cannot rely confidently on trademark law to protect the equity they have invested in their toll free numbers.

V. CONCLUSION

For the reasons discussed herein, the Commission should establish a right of first refusal for current and future holders of 800 numbers. The Commission also should require a reasonable, one-time fee for exercising such right to help ensure that toll free numbers are

^{14/} See, e.g., A.J. Canfield Co. v. Honickman, 808 F.2d 291, 304 (3d Cir. 1986)("Courts refuse to protect a generic term because competitors need it more to describe their goods than the claimed markholder needs it to distinguish its goods from others.").

^{15/} NPRM ¶ 39.

^{16/} Compare Dranoff-Perlstein Assocs. v. Sklar, 967 F.2d 852 (3d Cir. 1992)(holding that telephone numbers which correlate to generic terms do not merit trademark protection) with Dial-A-Mattress Franchise Corp. v. Page, 880 F.2d 675 (2d Cir. 1989)(holding that telephone numbers that correlate to generic terms are protectible).

allocated fairly and efficiently. No other solution that the Commission has proposed will achieve this end as effectively as a right of first refusal.

Respectfully submitted,

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Dated: November 1, 1995